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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration	)	PP Docket No. 93-21

REPLY COMMENTS
OF
THE ASSOCIATION OF
INDEPENDENT TELEVISION STATIONS

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April 12, 1993

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Executive Summary

INTV believes there has been a discernable shift in sports programming away from over-the-air television. The comments in this proceeding document a clear pattern of sports siphoning.

The central thrust of cable comments is that local stations have abandoned sports programming. Cable argues that it is merely supplementing sports programming that is on off-air television.

Local television stations want to broadcast sports programming. However, there are structural barriers in the industry which prevent stations from securing sports rights. Local stations have only one source of income -- advertising revenues. Retransmission consent will not significantly alter this equation. Cable has two income streams -- advertising and subscriber fees. As long as this basic equation remains, broadcasters will lose rights to sporting events. We have reached a point where local stations can no longer pay exorbitant sports rights fees based on revenues from advertising. The FCC and Congress must act to rectify this inequity.

Sports siphoning takes several forms. ABC/ESPN and regional cable sports networks have entered into preclusive contracts with collegiate athletic conferences which prevent stations from broadcasting local college football games. It has become difficult, if not impossible, to obtain rights directly from the universities. Regular season, major league baseball games are migrating away from local television stations. Generalized statistics purportedly demonstrating that more games are now available on over-the-air television do not address the key issue in this proceeding. Where regional cable sports channels exist, the number of games appearing on local television stations have declined. Moreover, the national rights contracts with Major League Baseball will merely accelerate sports siphoning at the local level.

The FCC should take steps to: 1) prevent cable programmers and

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REPLY COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

In our initial comments, the Association of Independent Television Stations, Inc. (INTV) documented a discernable shift in sporting events from over-the-air television to cable sports channels. While numerous comments alleged there is no sports migration or siphoning problem, they fail to address the real issues raised by the 1992 Cable Act's concerns in this area.

In reply, INTV will emphasize several specific areas where sports siphoning has become most acute. Specifically, the time block exclusivity arrangements that exist in major college sports and major league baseball provide a stark picture of the future of sports on television. In addition, despite generalized statistics, there is a direct relationship between cable sports channels and games leaving off-air television.

I. BROADCAST AND CABLE: STRUCTURAL ECONOMIC INEQUALITY

INTV is compelled to dispel a central myth which runs through most of the comments filed by the cable industry and the various sports leagues. These commenters argue that broadcasters have abandoned sports programming and cable sports channels, have entered the arena to provide coverage of games that broadcasters some markets, where a sports channel is marketed as an *a la carte* pay service, subscribers pay a specific fee for the service. In other instances, a cable sports channel is part of an expanded basic service tier. In these instances the cable operator can spread the cost of providing the service over a number of channels that are packaged with the cable sports channel.[1]

Second, both cable operators and sports channels have the ability to sell advertising, creating a second revenue stream

Third, as the comments filed by NBC, Rainbow and ARC demonstrate, most cable sports channels are owned by major cable MSOs. The efficiencies of vertical integration, preferential treatment and cross promotion opportunities on other commonly owned cable program services give these sports channels a significant advantage. Moreover, in recent years independently owned sports channels have merged, creating a national network of "regional" sports channels.

Fourth, given their regional and in some cases national reach, cable sports channels are in a better position to negotiate directly with a league or conference. This has occurred at both the professional and collegiate levels. Generally, this means that the rights granted by the leagues takes precedence over rights granted by individual teams or schools.[3]

Fifth, the cable operator itself is a monopoly in its local market. With relatively few exceptions there is no competition. Demand for cable in these markets is relatively inelastic. Costs can continue to be passed on to consumers with little or no subscriber loss.

Finally, there is the rapid technological development in cable retransmission services. It is no secret that many cable operators are expanding capacity through fiber optics and digital

[3]Examples can be seen in ESPN's Wednesday night exclusivity arrangement with Major League Baseball and its exclusive window contract with the CFA.

transmission.[4] In addition, the telephone companies are poised to enter the cable business.[5] In both cases, the role of the local off-air broadcaster as a packager of sports and entertainment programs will be challenged in the very near future. With addition transmission capacity, sports rights holders will find it easier to keep these rights and transmit games on a pay-per-view basis. The National Hockey League, National Football League and college football have all experimented or plan experiments with pay-per-view services. As transmission capacity increases, one can envision attempts by leagues and conferences to cut out the middleman, i.e. the broadcaster, and transmit games directly to subscribers.

Against this economic juggernaut, stands the local television station. Its only source of revenue is the advertising from a single video channel. Because there are several television stations in most markets, local broadcast advertising markets are extremely competitive. Accordingly, the demand for advertising is relatively elastic. Stations are simply not in a position to increase advertising rates to cover the increased costs of acquiring sports programming.

In the future, a station may be in a position to obtain some retransmission consent fees. However, unlike cable sports

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[4] See Broadcasting & Cable, April 12, 1993 at 8, 18.

[5] See H.R. 1312, 103rd Cong., 1st Sess. (1993). The legislation offered by Rep. Boucher and Rep. Oxley would permit the telephone companies to enter the cable business in their service areas. Also, the FCC's video dial tone increases the opportunity for direct sports feeds on a packaged or pay-per-view basis.

programmers, these fees cannot be passed on to cable subscribers, at least for the first round of retransmission consent contracts. Moreover, in each local cable community there are many competing television stations. A cable operator occupies the position of a monopsonist purchaser, playing one station against another, thereby driving retransmission fees towards zero. Moreover, many of the stations seeking to acquire sports rights are Independent stations, generally the weaker stations in the market. These stations are the least likely to obtain significant retransmission fees.

There is little or no ability to cross promote or spread out costs. We only have a single channel.

Finally, local stations are not in a position to contract with the leagues or conferences. Stations contract with a local professional sports team or local university. As a result a station's sports rights, if any, become subservient to league or conference contracts.

Thus, when cable sports channels or the leagues assert that local stations have abandoned sports and that cable is merely supplementing games of free television, INTV suggests you avoid being seduced. There are fundamental, structural reasons for the increase of sports on cable. Sports rights holders, be they professional or collegiate, are seeking to maximize revenue. This is their right. Sports is a business. However, the price has become too high for most stations to cover with revenue from a single channel of advertising. To suggest that stations no longer desire to carry sporting events is incorrect. The marketplace structure is uneven. It cannot be fixed on its own.

This is precisely why Congress commenced this sports siphoning inquiry. It recognized that broadcasting, which is based on a systems of indirect payments through a single around this country. After making such an enormous contribution to professional and college sports, it is patently unfair for the American taxpayer to be forced to pay twice. Keeping sporting events on over-the-air television is the only way to ensure universal access.

Finally, the negative ramifications of sports migration is not limited to sporting events. For many Independent stations, providing sports programming is essential to the station's success. Absent such programming the stations will find themselves in a perilous situation. Sports programming is unique. If denied access to games, stations will attempt to find substitutes with more generalized entertainment fare. However, substitute programming will not draw the same sizable audiences. In the end, stations will lose advertising revenues. This will effect a station's overall ability to provide top quality programming to the people it is licensed to serve.

INTV respectfully requests that the FCC keep these important policy considerations in mind as it examines the sports migration issue. Economic greed, disguised as market efficiencies, should not be the controlling factor. Diversity of sports programing that is available to all American citizens should be the paramount consideration.

III. COLLEGE FOOTBALL

INTV's initial comments documented the difficulty, indeed the impossibility, of a local station securing rights to broadcast live college football games. It was INTV's fondest hope that the Supreme court's decision in NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) would break the anticompetitive and monopolistic practices in college football. In that decision the Supreme Court rejected the NCAA's arguments that restricting the number of games that could be televised is necessary to protect ticket sales:[6]

> At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output -- just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he rule of reason does not support a defense based on the assumption that competition itself is unreasonable." (citation omitted)[7]

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[6]Interestingly enough the NCAA argued in this proceeding that protecting the gate by limiting broadcast exposure is not a real concern. In the context of basketball it stated:

> As for the relationship between broadcast exposure and gate receipts, we believe there is some relationship, but gate receipts are more affected by the won-lost record a team is compiling. NCAA Comments at 18.

[7]NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. at 116-117.

The court opined further:

> Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well supported finding that many more games would be televised in a free market than under the NCAA plan.[8]

Indeed immediately after the NCAA decision, local television stations began to contract directly with universities for the broadcast of college football games. Most commenters agree that in 1984 there were over 100 televised college football games.[9]

broadcast during this window. The restriction applied to "cross-over games" in which CFA teams were playing other colleges not affiliated with the CFA.[11]

At the same time CBS entered into similar contracts with the PAC 10 and Big Ten conferences.[12] A dispute arose when CBS wanted to broadcast games involving these conferences and CFA member schools. ABC sought to prevent CBS from airing these games based on its cross-over restrictions, which prevented the games from being broadcast during the exclusive time period window.

The Court of Appeals sustained a District Court decision which granted a preliminary injunction and prevented the CFA schools from withholding consent to televise the games based on the ABC/CFA contract.[13] In sustaining the District Court's preliminary injunction the court made several interesting observations regarding ABC/ESPN's CFA contract.

> The features of the ABC-CFA contract will no doubt have the effect of limiting the output of televised college football. The exclusionary nature of the crossover restriction appears on its face to be in furtherance of a concerted refusal to deal.[14]

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[11]As the court found, the broad geographic span of CFA schools including schools reveals the imposing position the CFA occupies within the college football broadcast market. Id. at 513 n.1

[12]Ironically, this problem has been solved because ABC and ESPN have acquired the rights to the PAC-10 and Big Ten games.

[13]Id. at 513

[14]Id. at 517.

However, the court's analysis was not limited to the network cross-over restrictions:

> The ABC-CFA "arrangement" just as the NCAA television plan that fell before it shared the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition. Moreover, this conclusion applies with as much force to the ABC-CFA contract considered as a whole as it does to the component restraints found in the cross over restriction.[15]

Indeed, INTV brought suit against the CFA, claiming the time period exclusivity windows in the CFA's contract with ABC and ESPN were a restraint of trade. Association of Independent Television Stations v. College Football Association, 637 F. Supp. 1289 (W.D. Okla. 1986). Unfortunately, the court did not grant INTV's motions for summary judgement and ordered a trial. Lacking the resources to continue a very expensive antitrust litigation, INTV settled out of court.[16]

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[15] Id. at 518.

[16] The Federal Trade Commission has commenced a proceeding against ABC and the CFA. INTV respectfully suggests that the Commission contact the FTC and examine the record in that case. See In the Matter of College Football Association and Cap Cities ABC, Federal Trade Commission Docket No. 9242 (1990).

Importantly, while the FTC has jurisdiction over issues involving anticompetitive activities, the 1992 Cable Act authorized the FCC to investigate and make recommendations regarding preclusive contracts. In this regard, the FCC's concern is promoting diversity, competition and universal access to sports programming via off-air television. Indeed, the FCC's former sports siphoning rules were premised on these theories. Accordingly, action by the FTC does not preclude FCC action. Moreover, the FTC has not commenced a proceeding against other cable sports programmers with similar preclusive contracts.

The goal of the NCAA case remains unfulfilled. Time period exclusivity "windows" have significantly curtailed the ability of local stations to contract directly with universities. Indeed, the reason ABC's contracts contain such provisions is to reduce head to head competition. ABC's comments are unabashed in stating:

> The exclusivity provisions in ABC's agreement with the CFA reduce the extent of direct, head-to-head competition between ABC's college football telecasts and other college football telecasts and thereby enable ABC to achieve higher audience ratings for its telecasts than would otherwise be available.[17]

Indeed, only Notre Dame has sought to break ranks with the major college football powers and negotiate a separate television package. Despite early fears that more schools would begin to contract for games individually, the CFA has not suffered any major defections. Today the ABC/CFA contract includes schools in the ACC, SEC, Big 8, Southwest Conference and the Big East. As for the PAC-10 and Big Ten, ABC contracts directly with the conferences and has similar time period exclusivity provisions. The net result of this new CFA formulation was best summed up by in 1990 by the Athletic Director of Syracuse University:

> "We've been able to market college football television fairly successfully, trying to get back up to where we were six or seven years ago. And we're getting closer-- the closest we've been since the NCAA was taken out of control of college football television.[18]

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[17]ABC Comments at 11.

[18]Scott Barrett, "Our Lady of NBC Sports," View Magazine February 26, 1990 at 15. (quoting Jake Krauthamel, athletic director, Syracuse University)

Accordingly, the entire objective of the CFA and ABC/ESPN arrangement is to replicate as much as possible the lock on college football that previously existed under the NCAA agreement.[19]

Looking at schedules of the major college football reveals that local television stations have been shut out of the process.[20] The present situation appears on Table I.

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[19]ABC argues that the 1992 Cable Act's concerns regarding preclusive contracts apply only to cable sports channels. To this end ABC and ESPN filed separately in this proceeding, each indicating that their exclusive window contracts with all CFA teams, PAC-10 and Big Ten is only about three hours each. Remember, ABC owns ESPN. Under the terms of the CFA contract ABC gets first choice in the selection of games and ESPN gets the second choice. The two contracts work in tandem, blocking out approximately seven hours of college football every Saturday from 3:00 PM EST to 10:00 PM, EST. In the Big Ten Conference, ABC/ESPN control football from 12:30 to 6:30 PM EST. In the PAC 10, ABC/ESPN/PTN control the 3:30 PM to 10:00 PM EST time block. On the west coast this equates to a 12:30 to 7:00 PM exclusivity window.

Thus the FCC correctly notes that ABC's arrangements with all

Now assume you want to broadcast a live local college football game. First you look at the exclusive windows to find an open time slot, hoping that ESPN or ABC has not selected your game for carriage. If it is a Big Ten school, then the 6-10PM time slot looks good. However, under the Big Ten contract local broadcasters may only televise games on a tape delayed basis after 10:30 PM EST.[21] There is one exception, however, under the Big Ten contract that a game can be televised live in the "home markets" of the schools that are playing. Thus you decide to broadcast a game on Saturday night from 6-10PM EST. The situation becomes next to impossible if your team is playing another conference.

Of course if the Big Ten school is playing an away game involving a CFA team, you have to deal with ESPN's exclusive 6-10 PM window with CFA teams in the ACC, SEC, Big 8, South West Conference or the Big East. If you attempt to use the Big Ten's open window in the evening to broadcast a game with the PAC 10 you conflict with ABC's and ESPN's window on the west coast because of the time zone difference.

ABC in its comments states that CFA schools have the ability to contract for local games provided the games start before 12:10 PM local time (12:40 local time for the SEC).[22] Of course in most cases a local station cannot avail itself of the window with

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stations out of the bidding process.

[21]NAB, Sports on Television at 78.

[22]ABC Comments at 10.

other CFA teams because the ACC, SEC, SWC, Big East have contracted these games away and established their own exclusive windows. It won't work with Big Ten schools, because ESPN has the 12:30 - 3:30 window. Finally it won't work if you are an east coast team playing a PAC 10 school because you would have to convince the school start kickoff at 9:30 AM Pacific Time.

The proof is in the pudding. In 1990, the NAB's Sports study noted that in the Big 8 conference there was no over-the-air syndicated broadcast package. Only Colorado and Iowa had live packages.[23] The remaining schools were available on a tape delay basis only. Big Ten games are mostly provided, if at all, on a tape delay basis after 10:30 PM.[24] Even in this context, several cable sports channels have acquired the rights to the tape delay games.[25] While some of the remaining games available in the ACC are syndicated by Jefferson Pilot to broadcast stations, it also syndicates the games back to ESPN.[26]

As for the PAC-10 the NAB study found:

> In the Pacific Time Zone, the ABC and Prime Ticket/ESPN windows extend from 12:30 - 7:00 p.m. As a result,

Interestingly enough, the two stations wishing to carry Arizona and Arizona State games, KSMB and KUTV, have had difficulties extraordinary step of filing an antitrust suit against Prime Ticket, the Universities and ABC.[30]

Unfortunately, the station's problems do not stop here. Its situation demonstrates that the problem with exclusive contracts is not confined to the CFA and major football conferences. KMPH has also had problems with the Big West Athletic Conference.

In 1985 the station entered into an agreement with Fresno State giving it a right of first refusal to carry the

University and Washington State, both PAC-10 Teams, conflicted with the ESPN/Prime Ticket Network's exclusivity window with the PAC 10.[32] As part of a compromise, and to avoid breach of contract, Fresno State offered the station games with the University of Pacific (November 9, 1991) and San Jose State (November,23 1991) as part of a compromise.

Enter the SportsChannel. In early October the Sports Channel claimed that it had the exclusive right to cable-cast these games. The station attempted to negotiate with the SportsChannel whereby the cable network would "split feed" its signal, blacking out its signal in KMPH's ADI and carrying the game in surrounding markets.[33] SportsChannel refused, stating that it buys rights to drive cable distribution. Ironically, at the time, the cable systems in KMPH's market did not provide the SportsChannel as a service.[34]

Because of its pre-existing contract, KMPH pursued the matter in court and ultimately prevailed.[35] However the case dramatically illustrates the difficulties stations encounter [illegible] exclusive windows and regional cable sports channels

As noted in our initial comments KMPH is certainly not alone. KCPQ in Washington, KUTP and KMSB in Arizona, KDSM in Iowa and others have been unable to secure the rights to carry college football games.[36]

The promise of the NCAA case was that individual schools would negotiate television rights with local stations and even cable systems. The objective was to eliminate the horizontal integration practices which limited output and increased prices. The promise remains unfulfilled. Today there is a definite hierarchy in the selection of college football rights.

1. ABC with its CFA, Big Ten and PAC-10 contracts gets first choice of games and exclusivity for a three hour time period.

2. ESPN gets the second choice and an exclusive three hour window.

3. Cable sports channels and syndicators contracting with the various conferences get the remaining games. At least in one instance, the Big East syndicates its own games. Schools in the SEC have taken their remaining games to pay-per-view.

4. Local stations attempting to contract directly with universities.

At all levels, the strategy of entering into conference contracts and granting time period exclusivity in these contracts, prevents local stations from even attempting to negotiate for college football games.[37]

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[36] INTV Comments at 10-17.

[37] Interestingly, Rainbow, a wholly owned subsidiary of Chuck Dolan's Cablevision which owns the SportsChannel empire that includes Prime Sportschannel Networks, and Prism did not comment

Even if a station can dodge the windows, it is impossible to know whether the game you want to broadcast will be available. ABC and ESPN are permitted to make their final selections up to 12 days before kickoff. Syndicators and regional sports channels with conference contracts get second choice. Thus, it is impossible for a local television station to get guaranteed rights to a specific game. Its rights may be bumped at the last minute. It is difficult, if not impossible, to sell advertising under such conditions. Unless some certainty is injected into the process, local stations will continue to find it difficult to contract for local college games.

Perhaps the most revealing evidence presented in this proceeding was the number of total games not televised in the major football conferences in 1992.[38]

Conference	Games Not Shown
ACC	57
SEC	77
Big 8	66
SWC	50
Big 10	68

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extensively on college football. Rainbow Programming Holding Inc. at 1-2. However, as KMPH discovered to its detriment, the SportsChannel is involved in college football. In addition, Affiliated Regional Communications Inc (ARC) which has ownership interests in cable sports channels across the country provides very little information about its college football activities. Comments of Affiliated Regional Communications Inc., at 8-9 and Appendices.

[38]Comments of ESPN at Exhibit C.